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# California Law Review

Volume IV.

MAY, 1916

Number 4

## The Scope and Meaning of Police Power

**I**N ARTICLE I, section I, of the California Constitution, the inalienable rights of man are set forth in this language:

"All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

It is evident, however, that if, in attempted exercise of inalienable rights, an individual should do with his own or conduct himself as he willed, without the internal restraint of conscience or the external restraint of law, others less able than himself to assert and defend their personal and property rights would, by reason of his unregulated assertion of his own personal and property rights, inevitably suffer an infringement of their equally inalienable rights. The common experience of mankind is that the restraints of conscience can not be relied upon in every case to restrain individuals from infringing the rights of others. Thus, that men may live together in society and enjoy with some equality their inalienable rights, it becomes necessary that each be subjected in the enjoyment of his own rights to at least some measure of regulation by legislation.

In other words, the guaranty of individual freedom and individual property, of the right of the individual to do with his own and to conduct himself as he wills, can not be applied abstractly as though there were but one individual and he a law unto himself; but must be applied concretely in the light of the relationship of each individual to others, and of the principle necessary to the friendly intercourse of men with men as equals expressed in the maxim, *sic utere tuo ut alienum non laedas*, "so use your own as not to injure another's." It is the function of positive law to see that this constitutional guaranty is so applied.

There are many statements in the opinions of the state Supreme Court and the District Courts of Appeal that express or necessarily imply these propositions.

In *Ex parte Koser*,<sup>1</sup> Justice McKee concurring in the judgment, said:

"Under our free form of government, the Legislature of the state has authority, in the exercise of the police power of the state, to establish for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as reasonably consistent with a correspondent enjoyment by others."

And Justice Sharpstein, dissenting, said in the same case:

"A person who acquires property, acquires the right to use it, subject to 'the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.'"

In *Ex parte Moynier*,<sup>2</sup> it is said:

"It is true, all persons may acquire, possess, and protect property, and may pursue and obtain safety and happiness; but these rights must be exercised with reference to the rights of others; and whenever it is necessary for the health or protection of members of the community that regulations should exist and be enforced, the power is given by the Constitution to local authorities to make and enforce such regulations."

In *Collins v. Lean*,<sup>3</sup> it is said:

"It is firmly settled by the law that all rights of property are held subject to such reasonable and proper control of the mode of its keeping and use as may be deemed necessary for and in consonance with the welfare of the general public."

In *Ex parte Yick Wo*,<sup>4</sup> after quoting from 2 Kent's Commentaries 340, the statement that it is a "general and rational principle that every person ought to so use his property as not to injure his neighbor, and that private interests must be made subservient to the general interest of the community," the court said:

"Every citizen holds his property subject to the proper exercise of the powers and restrictions above referred to. A large proportion of the laws and ordinances, relating to the comfort, safety, health, convenience, good order, and general welfare of the inhabitants of cities and towns, and which we

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<sup>1</sup> (1882), 60 Cal. 177, 196, 210, 9 Pacific Coast Law Journal 163.

<sup>2</sup> (1884), 65 Cal. 33, 2 Pac. 500.

<sup>3</sup> (1885), 68 Cal. 284, 289, 9 Pac. 173.

<sup>4</sup> (1885), 68 Cal. 294, 297, 9 Pac. 139, 58 Am. Rep. 12, judgment reversed, *Yick Wo v. Hopkins* (1886), 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. Ed. 220.

style police laws and regulations, have the effect in a greater or less degree to disturb and curtail individual enjoyment, and personal rights. . . . It is but a reasonable restraint upon the use of property in those cases, where its unlimited use or enjoyment would produce serious mischief to others."

In *People v. Williamson*,<sup>5</sup> the court in the leading opinion said:

"The police power more specifically refers to the necessity and right of government to place restrictions upon the use of private property for the common advantage."

In *Ex parte Quarg*,<sup>6</sup> Justices Shaw, Beatty, Angellotti, Lorigan and Henshaw, in the leading opinion, referring to the rights of acquiring, possessing and protecting property, said:

"These rights are in fact inherent in every natural person, and do not depend on constitutional grant or guarantee. Under our form of government by constitution, the individual, in becoming a member of organized society, unless the constitution states otherwise, surrenders only so much of these personal rights as may be considered essential to the just and reasonable exercise of the police power in furtherance of the objects for which it exists."

In *Plumas County v. Wheeler*,<sup>7</sup> it is said:

"Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." *Commonwealth v. Alger* (1851), 7 Cush. 53. 'The most proper business may be regulated to prevent its becoming offensive to the public sense of decency, or for any other reason injurious or dangerous.' *Cooley*, Const. Lim., 6th ed., 753."

In *Ex parte Elam*,<sup>8</sup> it is said:

"Whatever right one has, even in his own, is subject to that established principle that his use shall not be injurious to the rights of others, or the general public."

In *Ex parte Yun Quong*,<sup>9</sup> it is said:

"The constitutional right to hold and enjoy property is subject to such reasonable regulations as is necessary to con-

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<sup>5</sup> (1902), 135 Cal. 415, 419, 67 Pac. 504.

<sup>6</sup> (1906), 149 Cal. 79, 80, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. (N. S.), 183, 9 Ann. Cas. 747.

<sup>7</sup> (1906), 149 Cal. 758, 762, 87 Pac. 909.

<sup>8</sup> (1907), 6 Cal. App. 233, 237, 91 Pac. 811.

<sup>9</sup> (1911), 159 Cal. 508, 511, 114 Pac. 835, Ann. Cas. 1912C, 969.

serve the public health and morals and to promote the common good."

It thus appears that the inalienable rights of every one are subject to such regulation by legislation as tends to prevent him in the exercise of his own inalienable rights from unreasonably infringing upon those of others, and to secure to him the same uninterrupted enjoyment of his own inalienable rights as others enjoy.

That this regulatory power is the so-called police power may not only be gathered from the express language of some of the foregoing quotations, but is also in harmony with other declarations of the courts. A number of decisions content themselves with the statement that the inalienable rights are subject to the exercise of police power.<sup>10</sup> In others, it is stated that the police power derives its existence from the rule that the safety of the people is the supreme law.<sup>11</sup> In another, it is said of the police power:<sup>12</sup>

"It is co-extensive with self-protection, and is often referred to as 'the law of overruling necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society."

Thus police power is the means for safeguarding the inalienable rights of each so that they will not be unreasonably infringed by others, the means of the social application of the inalienable rights. "A police regulation or restraint is for the purpose of preventing damage to the public or to third persons."<sup>13</sup>

On the other hand, it is evident that if the inalienable rights were abstractly viewed as authorizing an individual possessed of them to do with his own and to conduct himself as he willed,

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<sup>10</sup> *Odd Fellows' Cemetery Ass'n v. San Francisco* (1903), 140 Cal. 226, 235, 73 Pac. 987; *Ex parte Kelso* (1905), 147 Cal. 609, 612, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. (N. S.) 796; *Ex parte Newell* (1906), 2 Cal. App. 767, 768, 84 Pac. 226; *Ex parte Elam* (1907), 6 Cal. App. 233, 237, 91 Pac. 811; *Ex parte Quong Wo* (1911), 161 Cal. 220, 228, 118 Pac. 714; *Ex parte Miller* (1912), 162 Cal. 687, 692, 124 Pac. 427, judgment affirmed, *Miller v. Wilson* (1915), 236 U. S. 373, 35 Sup. Ct. Rep. 342, 59 L. Ed. 628.

<sup>11</sup> *Ex parte Hayden* (1905), 147 Cal. 649, 650, 82 Pac. 315, 109 Am. St. Rep. 183, 1 L. R. A. (N. S.) 184; *Ex parte Drexel* (1905), 147 Cal. 763, 766, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878; *Goytino v. McAleer* (1906), 4 Cal. App. 655, 658, 88 Pac. 991; *Ex parte Stollenberg* (1913), 21 Cal. App. 722, 132 Pac. 841.

<sup>12</sup> *Ingram v. Colgan* (1894), 38 Pac. 315, adopted on rehearing, *Ingram v. Colgan* (1895), 106 Cal. 113, 122, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187.

<sup>13</sup> *Sonora v. Curtin* (1902), 137 Cal. 583, 585, 70 Pac. 674.

wholly regardless of others, they would absolutely preclude the power to pass laws regulating personal or property rights or prescribing remedial rights or penalties or punishments. Thus it is true, as said in certain cases, that the police power is the power to govern.

In this connection in a recent California case, the court in the leading opinion, quoted from the Supreme Court of Washington, as adequately and well describing the police power, the following:<sup>14</sup>

"By means of it the Legislature exercises a supervision over matters affecting the common weal and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it the state may 'prescribe regulations, promote the health, peace, morals, education and good order of the people and legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity.' In fine, when reduced to its ultimate and final analysis, the police power is the power to govern."

Furthermore, as police power is but the means to secure the social application of the inalienable rights, it follows that the constitutional guaranties of the bill of rights, such as those forbidding the impairment of the obligation of contracts and the taking or damaging of private property without just compensation first made, and those insuring freedom of pursuit and of the person, are not invaded by the exercise of police power or by police regulations.<sup>15</sup> It is no valid objection to a police regulation that it prevents a person from doing something that he desires to do or that he might do if it were not for the regulation.<sup>16</sup> It is no obstacle to the exercise of police power that such exercise will destroy an established business or render valueless property in-

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<sup>14</sup> Per said justices in *Western Indemnity Co. v. Pillsbury* (1915), 50 Cal. Dec. 172, 291, 151 Pac. 398. Compare *Reed v. Collins* (1907), 5 Cal. App. 494, 503, 90 Pac. 973; *Ex parte Mitchell* (1912), 19 Cal. App. 567, 571, 126 Pac. 856.

<sup>15</sup> *Odd Fellows' Cemetery Ass'n v. San Francisco* (1903), 140 Cal. 226, 235, 73 Pac. 987. "The provisions of the constitution forbidding laws impairing the obligation of contracts. . . have no application." *Ex parte Zhizhuzza* (1905), 147 Cal. 328, 335, 81 Pac. 955. Proper police regulations "are not unconstitutional because they may incidentally operate to deprive individuals of their property or its use without compensation, or interfere with their personal liberty, nor because they may give one person a monopoly of a certain business or occupation."

<sup>16</sup> *French v. Davidson* (1904), 143 Cal. 658, 662, 77 Pac. 663.

vested therein.<sup>17</sup> It is of no consequence in determining the validity of a city ordinance making it unlawful to maintain or operate public laundries except in certain specified districts of the city, that a person who had been operating a laundry within territory from which they were excluded had an unexpired leasehold interest in the laundry premises.<sup>18</sup>

Police power cannot be bargained or contracted away, and all rights and property are held subject to it.<sup>19</sup> "The right to exercise the police power is a continuing one, and a business lawful today may, in the future, because of the changed situation, or other causes, become a menace to the public health and welfare, and be required to yield to the public good."<sup>20</sup>

## II. THE LIMITS OF POLICE POWER.

Police power may be exercised only for the accomplishment of its purpose, that is, for the safeguarding of the inalienable rights of each so that they will not be unreasonably infringed by others. As was said by the Supreme Court in *Ex parte Jentzsch*:<sup>21</sup>

"Our government was not designed to be paternal in form . . . . Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows. Our institutions are founded upon the conviction that we are not only capable of self-government as a community, but what is the logical necessity, that we are cap-

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<sup>17</sup> *Grumbach v. Leland* (1908), 154 Cal. 679, 684, 98 Pac. 1059; *Ex parte Hadacheck* (1913), 165 Cal. 416, 420, 132 Pac. 584.

<sup>18</sup> *Ex parte Quong Wo* (1911), 161 Cal. 220, 228, 118 Pac. 714.

<sup>19</sup> *Laurel Hill Cemetery v. San Francisco* (1907), 152 Cal. 464, 475, 93 Pac. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080, judgment affirmed, *Laurel Hill Cemetery v. San Francisco* (1910), 216 U. S. 358, 30 Sup. Ct. Rep. 201, 54 L. Ed. 515; thus neither any contract made by the city and county of San Francisco, granting a right to make interments of dead bodies in certain ground in perpetuity, nor any estoppel against such city and county, can have any force as against a future exercise by it of its police power.

<sup>20</sup> *Dobbins v. Los Angeles* (1904), 195 U. S. 223, 238, 25 Sup. Ct. Rep. 18, 49 L. Ed. 169, on reversing *Dobbins v. Los Angeles* (1903), 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95, where, similarly, the state court had said: "The exercise of the police power clearly covers prohibited buildings partly erected, although great hardship to the builder may follow." Also in *Ex parte Quong Wo* (1911), 161 Cal. 220, 226, 118 Pac. 714, the court said: "If the city council has the power to confine an occupation within prescribed limits (of the city), it must have the power to make changes in the limits so prescribed, the only limitation being, as in the case of originally fixing the limits, that the boundaries fixed must not be unreasonable."

<sup>21</sup> (1896), 112 Cal. 468, 472, 43 Pac. 803, 32 L. R. A. 664.

able to a great extent, of individual self-government. . . . We give to the individual the utmost possible amount of personal liberty, and, with that guaranteed him, he is treated as a person of responsible judgment, not as a child in his nonage, and is left free to work out his destiny as impulse, education, training, heredity, and environment direct him."

Thus any law which undertakes to abolish personal or property rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and general security, is not within the police power, but constitutes an unwarrantable invasion of individual rights.<sup>22</sup> If a profession or business is not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever.<sup>23</sup> "The sale of liquors not alcoholic or not of an intoxicating character cannot be prohibited or interfered with by the government any more than can the sale of any other harmless or necessary commodity or article of consumption."<sup>24</sup> "The Legislature cannot prohibit or seriously interfere with the right of the citizen to make harmless contracts touching the acquisition, protection, management, and enjoyment of property, contracts which do not wrongfully affect the lawful rights of others or the public safety, health, or morals."<sup>25</sup> In *Ex parte Miller*,<sup>26</sup> it is said:

"Because of the great value to mankind and the consequent paramount importance of the preservation of individual liberty, it is universally admitted and held that the police powers of the Legislature are not absolute or unlimited. These personal rights cannot be taken away or impaired at the mere will of the Legislature, nor at all, unless public welfare demands it."

It may also be gathered from the authorities that police power cannot be exercised on behalf of ascertained individuals but only on

<sup>22</sup> *Ex parte Koser* (1882), 60 Cal. 177, 210, 9 Pacific Coast Law Journal 163; *Ingram v. Colgan* (1894), 38 Pac. 315, adopted on rehearing, *Ingram v. Colgan* (1895), 106 Cal. 113, 123, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187; *Ex parte Kelso* (1905), 147 Cal. 609, 612, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. (N. S.) 796; *Ex parte Quarg* (1906), 149 Cal. 79, 81, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. (N. S.) 183, 9 Ann. Cas. 747.

<sup>23</sup> *Sonora v. Curtin* (1902), 137 Cal. 583, 585, 70 Pac. 674.

<sup>24</sup> *Ex parte Anixter* (1913), 22 Cal. App. 117, 124, 134 Pac. 193.

<sup>25</sup> *Ex parte Drexel* (1905), 147 Cal. 763, 766, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878.

<sup>26</sup> (1912), 162 Cal. 687, 693, 124 Pac. 427, judgment affirmed, *Miller v. Wilson* (1915), 236 U. S. 373, 35 Sup. Ct. Rep. 342, 59 L. Ed. 628.



behalf of individuals as part of an indefinite or a general public.<sup>27</sup> To be sure, a regulation is not to be condemned as beyond police power because it does not affect all the people, provided it affects an indefinite number similarly situated, as, for instance, the operatives employed in a given vocation.<sup>28</sup> But police power does not extend to the regulation of rates for water not supplied nor offered to the public at large, but only to the stockholders of the corporation which owns the water, and to such stockholders supplied at cost.<sup>29</sup>

Moreover, this regulatory power does not authorize interference with individual freedom or individual property to protect individuals from doing injury to themselves, unless consequences harmful to the public, tend to result therefrom.

In *Ex parte Sic*,<sup>30</sup> in the leading opinion, Justices Temple, McFarland and Searls said:

"To prohibit vice is not ordinarily considered within the police power of the state. . . . The object of the police power is to protect rights from the assaults of others, not to banish sin from the world or to make men moral. It is true no one becomes vicious or degraded without indirectly injuring others, but these consequences are not direct or immediate."

And in the same case Justice Paterson, concurring in the judgment, said:

"Every man has the right to eat, drink, and smoke what he pleases in his own house without police interference (unless he is trying to kill himself); and before the state or municipal authorities should ask the conviction of a person for smoking, eating, or drinking any particular thing, facts ought

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<sup>27</sup> See *Ingram v. Colgan* (1894), 38 Pac. 315, adopted on rehearing, *Ingram v. Colgan* (1895), 106 Cal. 113, 123, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187; *Ex parte Kelso* (1905), 147 Cal. 609, 612, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. (N. S.) 796; *Ex parte Hayden* (1905), 147 Cal. 649, 650, 82 Pac. 315, 109 Am. St. Rep. 183, 1 L. R. A. (N. S.) 184; *Ex parte Quarg* (1906), 149 Cal. 79, 80, 81, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. (N. S.) 183, 9 Ann. Cas. 747; *Ex parte Dietrich* (1906), 149 Cal. 104, 106, 84 Pac. 770, 5 L. R. A. (N. S.) 873; *Ex parte Miller* (1912), 162 Cal. 687, 693, 124 Pac. 427, judgment affirmed, *Miller v. Wilson* (1915), 236 U. S. 373, 35 Sup. Ct. Rep. 342, 59 L. Ed. 628; *Abbey Land & Improvement Co. v. San Mateo County* (1914), 167 Cal. 434, 440, 139 Pac. 1068.

<sup>28</sup> *Schaezlein v. Cabaniss* (1902), 135 Cal. 466, 468, 67 Pac. 755, 87 Am. St. Rep. 122, 56 L. R. A. 733.

<sup>29</sup> *McFadden v. Board of Supervisors* (1888), 74 Cal. 571, 573, 574, 16 Pac. 397.

<sup>30</sup> (1887), 73 Cal. 142, 145, 14 Pac. 405.

to be alleged and shown—even in cases of opium-smoking—that at least it was not done in the privacy of his own home . . . or that he was in some way aiding, encouraging, or abetting others in the use of the drug, injuring or jeopardizing the rights of others; or, in a word, that he was offending against the welfare of society in some way, beyond merely the injurious effect of the act upon himself alone.”

In *Ex parte Miller*,<sup>31</sup> the court said:

“So far as the effect on himself alone is concerned, each person has the absolute right to judge for himself whether the hard labor which he voluntarily performs is for his best interest or not. The Legislature cannot judge for persons in this respect and interfere solely to prevent them from injuring themselves by excessive labor. The injury must be of such character and extent and to such a number of persons that it may be reasonably supposed that it will cause injury to others, that is . . . to the public health and general welfare.”

Finally, a regulation in the exercise of the police power, to be valid must not be unreasonably or unnecessarily burdensome, and must have some appreciable tendency towards accomplishing a result within the scope of police power.

In *Ex parte Quarg*,<sup>32</sup> the holding was that,

“The police power . . . is subject to the just limitation that it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare.”

In *Laurel Hill Cemetery v. San Francisco*,<sup>33</sup> the court said:

“Ordinances placing such restrictions upon the use of any property or the conduct of any business as may be necessary for the public health. . . must, of course, bear a rational relation to the object sought to be attained. They may not be arbitrary or unreasonable. The exercise of the police power cannot be made a mere cloak for the arbitrary interference with or suppression of a lawful business. . . ‘The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose

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<sup>31</sup> (1912), 162 Cal. 687, 694, 124 Pac. 427, judgment affirmed, *Miller v. Wilson* (1915), 236 U. S. 373, 35 Sup. Ct. Rep. 342, 59 L. Ed. 628.

<sup>32</sup> (1906), 149 Cal. 79, 81, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. (N. S.) 183, 9 Ann. Cas. 747.

<sup>33</sup> (1907), 152 Cal. 464, 470, 93 Pac. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080, judgment affirmed (1910), 216 U. S. 358, 30 Sup. Ct. Rep. 301, 54 L. Ed. 515.

unusual and unnecessary restrictions upon lawful occupations.'"

In *Ex parte Junqua*,<sup>84</sup> it is said:

"Legislation, either local or general, which, when enacted under the pretext that it represents the exercise of the police power, is shown to be oppressive, thus imposing unnecessary or unreasonably burdensome conditions and restrictions upon and against that class upon which it is designed to directly operate, will not be sustained."

In *Ex parte San Chung*,<sup>85</sup> it is said:

"While generally it is for the legislature to determine what laws and regulations are needed to protect the public health and to secure public safety and comfort, yet they must have some relation to these ends, and if under the guise of police regulation attempt is made to violate personal or property rights, the courts will not hesitate to overthrow such a measure."

In *Ex parte Miller*,<sup>86</sup> it is said:

"The means adopted to produce the public benefit intended, or to prevent the public injury, must be reasonably necessary to accomplish that purpose and not unduly oppressive upon individuals."

In *Ex parte Stoltenberg*,<sup>87</sup> it is said that such laws should be reasonable and *Ex parte Hadacheck*,<sup>88</sup> holds that:

"The power to regulate the use of property or the conduct of a business is, of course, not arbitrary. The restriction must bear a reasonable relation to some legitimate purpose within the purview of the police power."

In *Pacific Telephone & Telegraph Company v. Eshleman*,<sup>89</sup> it is said by Justices Henshaw, Lorigan and Melvin in the leading opinion:

"It must be apparent that in the exercise of the sovereign police power many important questions will arise as to the reasonableness of the law or order. For, if reasonable, then the law or order is but a fair exercise of the sovereign power. If unreasonable it transgresses the constitutional provisions against the taking of private property for public use and unlawfully restricting personal liberty."

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<sup>84</sup> (1909), 10 Cal. App. 602, 605, 103 Pac. 159.

<sup>85</sup> (1909), 11 Cal. App. 511, 513, 105 Pac. 609.

<sup>86</sup> (1912), 162 Cal. 687, 694, 124 Pac. 427, judgment affirmed, *Miller v. Wilson* (1915), 236 U. S. 373, 35 Sup. Ct. Rep. 342, 59 L. Ed. 628.

<sup>87</sup> (1913), 21 Cal. App. 722, 724, 132 Pac. 841.

<sup>88</sup> (1913), 165 Cal. 416, 421, 132 Pac. 584.

<sup>89</sup> (1913), 166 Cal. 640, 662, 137 Pac. 1119.

Nevertheless, in scrutinizing a regulation applicable only in urban territory, the well-recognized principle that stricter regulations are essential to the good order and peace of a crowded metropolis than are required in the sparsely peopled portions of the country, must be kept in view.<sup>40</sup>

### III. CRITERIA WHETHER PARTICULAR REGULATIONS ARE AUTHORIZED BY THE POLICE POWER.

In the application to the details of every-day life of the general principles thus far considered, and in determining whether or not any particular regulation is authorized by police power, certain tests of the due exercise of police power have been developed by the courts.

It is settled that police power is not limited to the suppression of nuisances.<sup>41</sup>

It may be exercised, as has been variously stated, for the preservation or promotion of the general health, safety, good order, protection, morals, comfort, welfare, convenience, prosperity, peace, or good.<sup>42</sup>

It is declared, however, by department one of the Supreme Court, that, so far as it is advised, the promotion of aesthetic or

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<sup>40</sup> *Ex parte Cheney* (1891), 90 Cal. 617, 620, 27 Pac. 436; *Los Angeles County v. Hollywood Cemetery Ass'n* (1899), 124 Cal. 344, 347, 348, 57 Pac. 153, 71 Am. St. Rep. 75; *Ex parte Smith* (1904), 143 Cal. 368, 372, 373, 77 Pac. 180; *Ex parte Quong Wo* (1911), 161 Cal. 220, 233, 118 Pac. 714.

<sup>41</sup> *Ex parte Lacey* (1895), 108 Cal. 326, 328, 41 Pac. 411, 49 Am. St. Rep. 93, 38 L. R. A. 640; *Odd Fellows' Cemetery Ass'n v. San Francisco* (1903), 140 Cal. 226, 231, 73 Pac. 987; *Goytino v. McAleer* (1906), 4 Cal. App. 655, 657, 88 Pac. 991; *Laurel Hill Cemetery v. San Francisco* (1907), 152 Cal. 464, 474, 93 Pac. 70, 27 L. R. A. (N.S.) 260, 14 Ann. Cas. 1080, judgment affirmed, *Laurel Hill Cemetery v. San Francisco* (1910), 216 U. S. 358, 30 Sup. Ct. Rep. 201, 54 L. Ed. 515, where it was held that the fact that a cemetery situate in a thickly settled portion of a city is on soil of such a character that disease-breeding elements cannot be transmitted through it, that the district has not proved unhealthy, and that the cemetery is not a nuisance, does not render beyond police power a city ordinance prohibiting further interments in such cemetery; *Ex parte Murphy* (1908), 8 Cal. App. 440, 445, 97 Pac. 199; *Ex parte Murphy* (1909), 155 Cal. 322, 100 Pac. 1134; *Ex parte Junqua* (1909), 10 Cal. App. 602, 605, 103 Pac. 159; *Ex parte Quong Wo* (1911), 161 Cal. 220, 228, 118 Pac. 714; *Ex parte Stoltenberg* (1913), 21 Cal. App. 722, 724, 132 Pac. 841; *Ex parte Hadacheck* (1913), 165 Cal. 416, 419, 132 Pac. 584.

<sup>42</sup> *Ex parte Moynier* (1884), 65 Cal. 33, 36, 2 Pac. 500: "The health or protection of members of the community;" *Ex parte Kohler* (1887), 74 Cal. 38, 42, 15 Pac. 436: "The conservation of the health of its citizens;" *Abeel v. Clark* (1890), 84 Cal. 226, 230, 24 Pac. 383: "The health

artistic considerations alone has never been held to justify, as an exercise of police power, a radical restriction of the right of an owner of property to use it in an ordinary and beneficial way.<sup>43</sup> And prohibitions against cemeteries cannot be upheld on the ground that they are not pleasant to the eye, or that they are not agreeable subjects of contemplation, or that they are sources of annoyance to nervous or superstitious persons, or that they make

and prosperity of the state;" Ex parte Whitwell (1893), 98 Cal. 73, 78, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727: "The comfort, convenience, peace and health of the community;" Woodward v. Fruitvale Sanitary District (1893), 99 Cal. 554, 562, 34 Pac. 239: "The peace, good order, morals and health of the community;" Ingram v. Colgan (1894), 38 Pac. 315, adopted on rehearing, Ingram v. Colgan (1895), 106 Cal. 113, 122, 39 Pac. 437, 46 Am. St. Rep. 221, 28 L. R. A. 187: "The general comfort, health and prosperity of the state. . . the comfort and welfare of society;" Ex parte Kelso (1905), 147 Cal. 609, 612, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. (N. S.) 796: "The comfort, safety, or welfare of society;" Ex parte Hayden (1905), 147 Cal. 649, 650, 82 Pac. 315, 109 Am. St. Rep. 183, 1 L. R. A. (N. S.) 184: "The public welfare, the public health, or the public morals;" Ex parte Drexel (1905), 147 Cal. 763, 766, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878: "The public welfare, the public health, or the public morals;" Ex parte Quarg (1906), 149 Cal. 79, 81, 84 Pac. 766, 117 Am. St. Rep. 115, 5 L. R. A. (N. S.) 183, 9 Ann. Cas. 747: "The public health, morals, or safety, or the general welfare;" Plumas County v. Wheeler (1906), 149 Cal. 758, 762, 87 Pac. 909: "The public safety, comfort, or health;" Goytino v. McAleer (1906), 4 Cal. App. 655, 657, 88 Pac. 991: "The public health. . . morals, welfare, or safety;" Laurel Hill Cemetery v. San Francisco (1907), 152 Cal. 464, 474, 93 Pac. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080, judgment affirmed, Laurel Hill Cemetery v. San Francisco (1910), 216 U. S. 358, 30 Sup. Ct. Rep. 201, 54 L. Ed. 515: "The public health or morals;" Ex parte Quong (1911), 159 Cal. 508, 511, 114 Pac. 835, Ann. Cas. 1912 C 969: "The public health. . . morals and . . . the common good;" Ex parte Miller (1912), 162 Cal. 687, 694, 124 Pac. 427, judgment affirmed, Miller v. Wilson (1915), 236 U. S. 373, 35 Sup. Ct. Rep. 342, 59 L. Ed. 628: "The public health and general welfare;" Ex parte Hadacheck (1913), 165 Cal. 416, 419, 132 Pac. 584: "The public health or morals;" Williams v. Wheeler (1913), 23 Cal. App. 619, 625, 138 Pac. 937: "The public health;" Abbey Land & Improvement Co. v. San Mateo County (1914), 167 Cal. 434, 440, 139 Pac. 1068: "The public health, safety, convenience, or welfare."

In Ex parte Dickey (1904), 144 Cal. 234, 77 Pac. 924, 103 Am. St. Rep. 82, 66 L. R. A. 928, 1 Ann. Cas. 428: "The due exercise of the police power is limited to the preservation of the public health, safety, and morals, and . . . legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation." Shaw, J., dissenting, said (p. 242): "The police power . . . is not limited in its application to such laws as may be deemed necessary for the preservation of the general health and comfort. It embraces also the preservation and promotion of the general welfare and prosperity."

<sup>43</sup> Varney & Green v. Williams (1909), 155 Cal. 318, 320, 100 Pac. 867, 132 Am. St. Rep. 88, 21 L. R. A. (N. S.) 741, (where a municipal ordinance absolutely prohibiting the erection or maintenance of billboards for advertising purposes within the municipality was declared void).

the vicinity less attractive for a dwelling place, or for business, and thereby lessen the value of adjoining lands.<sup>44</sup> Likewise, the fact that by the erection and maintenance of a crematory in a given neighborhood the advance in price of the property in the vicinity may be retarded, owing to the aversion many people have to a residence near a graveyard, is not a ground for the exercise of police power against such crematory.<sup>45</sup>

On the question of the reasonableness of a particular regulation, the public danger actually experienced, or reasonably to be anticipated, in the absence of such regulation, is to be considered.<sup>46</sup> The bare possibility of danger is insufficient to justify an onerous regulation.<sup>47</sup> Nevertheless, in a proper case, an act or thing may be regulated or prohibited though never in the past offensive or injurious.<sup>48</sup> On the same question, the deep-seated convictions, the traditions and habits of the community must also be taken into consideration and given weight.<sup>49</sup> Police power "may be put forth

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<sup>44</sup> *Abbey Land & Improvement Co. v. San Mateo County* (1914), 167 Cal. 434, 438, 139 Pac. 1068.

Likewise, in *Ex parte Whitwell* (1893), 98 Cal. 73, 83, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727, where a county ordinance, containing stringent regulations with reference to asylums for the treatment of mild forms of insanity, was under review, the court said: "It is possible that the maintenance of such an asylum would be to some people in its vicinity disagreeable and annoying, in the sense that it would be more or less repulsive to them; but this is not enough to justify a regulation like that under consideration. There are many unpleasant and even annoying things which must be borne by persons living in a state of organized society, in order that others may also enjoy their equal rights under the law."

<sup>45</sup> *Abbey Land & Improvement Co. v. San Mateo County* (1914), 167 Cal. 434, 439, 139 Pac. 1068.

<sup>46</sup> *Ex parte Whitwell* (1893), 98 Cal. 73, 82, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727; *Odd Fellows' Cemetery Ass'n v. San Francisco* (1903), 140 Cal. 226, 234, 73 Pac. 987.

<sup>47</sup> *Ex parte Whitwell* (1893), 98 Cal. 73, 82, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727.

<sup>48</sup> *Odd Fellows' Cemetery Ass'n v. San Francisco* (1903), 140 Cal. 226, 232, 73 Pac. 987.

<sup>49</sup> In *Otis v. Parker* (1903), 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. Ed. 323, affirming judgment. *Parker v. Otis* (1900), 130 Cal. 322, 62 Pac. 571, 92 Am. St. Rep. 56, and sustaining the prohibitions of Const. Cal., Art. 4, sec. 26, against sales of corporate stock on margin, it was declared: "Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption, to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it

in aid of what is sanctioned by usage, or held by prevailing morality or strong and preponderant opinion to be greatly and immedi-

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'is a clear, unmistakable infringement of rights secured by the fundamental law'. . . .

"The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, of lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the Fourteenth Amendment became law, as indeed they were in some civilized states."

In *Laurel Hill Cemetery v. San Francisco* (1910), 216 U. S. 358, 365, 366, 30 Sup. Ct. Rep. 201, 54 L. Ed. 515, affirming judgment, (1907), 152 Cal. 464, 93 Pac. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080, the court said: "If every member of this bench clearly agreed that burying grounds were centers of safety and thought the Board of Supervisors [of San Francisco] and the Supreme Court of California wholly wrong [in forbidding burials, and sustaining the prohibition of burials, in San Francisco] it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. . . .

"And yet again the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic. Since, as before the making of constitutions, regulation of burial and prohibition of it in certain spots, especially in crowded cities, have been familiar to the Western World. . . .

"The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion, before it can expect this court to overthrow the rules that the lawmakers and the court of his own state uphold."

In *Ex parte Yun Quong* (1911), 159 Cal. 508, 515, 114 Pac. 835, Ann. Cas. 1912 C 969, the court said: "The validity of legislation which would be necessary or proper under a given state of facts does not depend upon the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established. If the belief that the use of opium, once begun, almost inevitably leads to excess may be entertained by reasonable men—and we do not doubt that it may—such belief affords a sufficient justification for applying to opium restrictions which might be unduly burdensome in the case of other substances, as, for example, intoxicating liquors, the use of which may fairly be regarded as less dangerous to their users or to the public."

Thus where certain ordinances of Los Angeles city, taken together, originally delimited seven industrial districts, to which by subsequent legislation were added more than forty additional industrial districts, some of the latter no larger than an ordinary city lot, declared that all the remainder of the ninety-four square miles of area in the city should be a residence district, and made unlawful the establishment or maintenance, within the residence district, among other things, of any public laundry; and where petitioner, who conducted a laundry in a thickly populated part of the residence district, showed by the affidavits of persons residing in the vicinity thereof that they had not noticed any offensive odors or loud or unusual noises in its operation, that no sickness had been caused to any of the respective families of affiants thereby, and that the operation of the laundry had not in any way

ately necessary to the public welfare."<sup>50</sup>

#### IV. PARTICULAR MODES OF EXERCISE OF POLICE POWER.

*Prohibition v. regulation.*—In case of necessary and useful pursuits, the character of which renders their operation obnoxious to some end within the purview of police power, such as laundries, tanneries, and soap factories, police power may be exercised for the purpose of regulation only, and neither directly nor indirectly for the purpose of prohibiting; but in dealing with a non-useful calling, such as a public billiard hall, or pool room, the character of which may render its operation obnoxious to some end within the purview of police power, the power extends to complete prohibition.<sup>51</sup> Accordingly, there is no power to entirely prohibit the ownership of dogs,<sup>52</sup> nor the business of manufacturing artificial gas,<sup>53</sup> nor of operating a public laundry,<sup>54</sup> nor of maintaining a private asylum for the treatment of mild forms of insanity, mental or nervous diseases, or alcoholism.<sup>55</sup> On the other hand, the carrying of concealed weapons,<sup>56</sup> such street noises as the beating of drums,<sup>57</sup> and all forms of gambling<sup>58</sup> may be entirely prohibited and suppressed. This is true of the traffic in intoxicating liquors as a beverage.<sup>59</sup> But the possession or

affected their safety, comfort or welfare, or, to their knowledge, that of any resident in the neighborhood; the facts shown by the affidavits in no way affect the question of the validity of the ordinance. Ex parte Quong Wo (1911), 161 Cal. 220, 234, 118 Pac. 714.

Compare, however, the remark of Sharpstein, J., in dissenting from the judgment in Ex parte Koser (1882), 60 Cal. 177, 213, 214, 9 Pac. Coast Law Journal 163, whereby the Sunday Law was sustained: "The circumstances that it seems to be considered by 'common consent' a necessary and salutary rule 'that man shall not work on Sunday' is not entitled to much weight in determining his constitutional right to do so. Something more than 'common consent' is required before a man can be deprived of any of his constitutional rights."

<sup>50</sup> Ex parte Lee (1915), 21 Cal. App. Dec. 632, 153 Pac. 992.

<sup>51</sup> Ex parte Murphy (1908), 8 Cal. App. 440, 444, 97 Pac. 199; Ex parte Murphy (1909), 155 Cal. 322, 100 Pac. 1134.

<sup>52</sup> Ex parte Ackerman (1907), 6 Cal. App. 5, 15, 91 Pac. 429.

<sup>53</sup> Ex parte Smith (1904), 143 Cal. 368, 371, 77 Pac. 180.

<sup>54</sup> Ex parte San Chung (1909), 11 Cal. App. 511, 516, 105 Pac. 609.

<sup>55</sup> Ex parte Whitwell (1893), 98 Cal. 73, 81, 85, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727.

<sup>56</sup> Ex parte Luening (1906), 3 Cal. App. 76, 81, 84 Pac. 445.

<sup>57</sup> Ex parte Flaherty (1895), 105 Cal. 558, 560, 38 Pac. 981, 27 L. R. A. 529.

<sup>58</sup> Ex parte Tuttle (1891), 91 Cal. 589, 591, 27 Pac. 933.

<sup>59</sup> Ex parte Christensen (1890), 85 Cal. 208, 213, 24 Pac. 747, judgment affirmed, Crowley v. Christensen (1890), 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. Ed. 620; Denton v. Vann (1908), 8 Cal. App. 677, 680, 97



sale of intoxicating liquors, opium and poisons, for the medicinal purposes for which they are commonly deemed efficacious, by duly licensed pharmacists, in the legitimate course of their business, and subject to proper governmental regulations for the protection of the public, cannot be entirely prohibited.<sup>60</sup>

*Making dependent on arbitrary will.*—A regulation by or under which an occupation, lawful, in itself, when properly conducted, and in no wise injurious to persons, property, or the public interest, may be absolutely prohibited at the dictation of any public authority without other cause than its own will or desire, is beyond the legislative authority.<sup>61</sup> A regulation requiring a permit from some public authority as prerequisite to the right to carry on a necessary business, and committing to that authority arbitrary power to issue or refuse the permit, in effect makes prohibition possible, and will not be sustained.<sup>62</sup> The right of a property owner to use his property in the prosecution of a lawful business, recognized as necessary in all civilized communities, cannot be made to rest upon the caprice of a majority, or of any number, of those owning property surrounding that which he desires so to use.<sup>63</sup> A statute cannot be sustained, making it unlawful to erect any fence more than ten feet high within any municipality without a permit from the legislative body thereof, and making the granting of the permit, except when the fence encloses a place

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Pac. 675; *Ritz v. Lightston* (1909), 10 Cal. App. 685, 688, 103 Pac. 363; *Ex parte Cutting* (1911), 17 Cal. App. 604, 608, 121 Pac. 304; *Guzzi v. McAllister* (1913), 21 Cal. App. 276, 278, 131 Pac. 336; *Ex parte Anixter* (1913), 22 Cal. App. 117, 121, 134 Pac. 193; *Ex parte Ellsworth* (1913), 165 Cal. 677, 685, 133 Pac. 272; *Giddings v. Board of Trustees* (1913), 165 Cal. 695, 697, 133 Pac. 479; *Ex parte Anixter* (1914), 166 Cal. 762, 138 Pac. 353.

<sup>60</sup> *Selma v. Brewer* (1908), 9 Cal. App. 70, 76, 98 Pac. 61.

<sup>61</sup> *Ex parte Dart* (1916), 155 Pac. 63, 51 Cal. Dec. 178, per Shaw, Sloss, J. J., Angellotti, C. J., & Lawlor, J., concurring in judgment.

<sup>62</sup> *Los Angeles County v. Hollywood Cemetery Ass'n* (1899), 124 Cal. 344, 349, 57 Pac. 153, 71 Am. St. Rep. 75, where an ordinance of Los Angeles county, making it unlawful to establish or extend any cemetery within any part of the county without first obtaining permission from the board of supervisors, and prescribing what facts must be set forth in the petition for such permission, and the procedure to be followed thereon, was involved.

<sup>63</sup> *Ex parte Sing Lee* (1892), 96 Cal. 354, 359, 31 Pac. 245, 31 Am. St. Rep. 218, 24 L. R. A. 195, where an ordinance of Chico made it unlawful to establish, maintain, or carry on the business of a public laundry for hire within the corporate limits, except in certain blocks, without a permit, and made issuance of the permit conditional on the written consent of a majority of the landowners within the block within which it is proposed to establish, maintain, or carry on the laundry, and of the four blocks immediately surrounding such block.

of public resort to which an admission fee is charged, conditional upon the written consent of the adjoining owner, "because it gives the owner of the adjoining property the right to prevent such a structure."<sup>64</sup>

But since the traffic in intoxicating liquors as a beverage may be prohibited altogether, conditions, even arbitrary, may be imposed on its existence.<sup>65</sup>

*Making possession unlawful.*—In some cases police power has been exercised through making unlawful the voluntary possession, except under prescribed circumstances, of a thing the use of which is often harmful to society in general.

Thus it has been held that the city and county of San Francisco has the right to pass an ordinance declaring it unlawful for any person, not having a permit from the police commissioners, other than a public officer or a person actually engaged at the time in making a journey, to wear or carry concealed, within the municipality, any pistol, dirk, or dangerous or deadly weapon, authorizing the police commissioners to grant such permit to any peaceful person whose profession or occupation requires him to be out at late hours of the night, and making violation of the provision a misdemeanor.<sup>66</sup> Ordinance 68 of San Francisco, making it "unlawful for any person to have in his possession any lottery ticket," and making violation of the ordinance punishable by fine or imprisonment or both, is valid.<sup>67</sup> The ordinance of San Bernardino county, making it unlawful to be in any public place with a concealed weapon, "provided, however, that the sheriff . . . may grant permits to carry such weapons to officers and other persons, as he may deem fit," is a reasonable exercise of police power.<sup>68</sup> That portion of section 8 of the Statute of 1907, page 124, as amended by Statutes of 1909, page 422, making unlawful the voluntary possession of opium or of any preparation or derivative thereof containing so much as two grains thereof to the fluid or avoirdupois ounce, except on a pre-

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<sup>64</sup> *Western Granite & Marble Co. v. Knickerbocker* (1894), 103 Cal. 111, 115, 37 Pac. 192.

<sup>65</sup> *Ex parte Christensen* (1890), 85 Cal. 208, 213, 24 Pac. 747, judgment affirmed, *Crowley v. Christensen* (1890), 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. Ed. 620.

<sup>66</sup> *Ex parte Cheney* (1891), 90 Cal. 617, 621, 622, 27 Pac. 436.

<sup>67</sup> *Ex parte McClain* (1901), 134 Cal. 110, 66 Pac. 69, 86 Am. St. Rep. 243.

<sup>68</sup> *Ex parte Luening* (1906), 3 Cal. App. 76, 78, 84 Pac. 445.

scription of a licensed physician, dentist, or veterinarian, and except the possession is that of manufacturer, dealer, or such licensed person, is valid.<sup>69</sup> In the most recent case on the subject, however, it was held that a provision of an ordinance of Azusa city, making unlawful the possession in the city, other than for medicinal or scientific purposes, of any alcoholic liquors, was in excess of the police power and void, on the ground that "it cannot be said that the mere possession thereof either produces or threatens to produce any harm to the public or to the ones having such article in his possession."<sup>70</sup> The court, however, declared that the city, in the exercise of its police power, might make it a misdemeanor for one to have in his possession intoxicating liquors with the intent to dispose of them for the use of others.<sup>71</sup>

*Requiring security against harm from a business.*—There is "no reason to doubt the power of the state, of any county or municipality, in the exercise of its police power of regulation, to require security in the shape of a bond or insurance policy from its licensees in all cases where the giving of such security may fairly be held to be a reasonable requirement for the protection of the public . . . . The most common instance of the requirement of such a bond is probably that of the licensed liquor dealer, and a requirement that he give a bond for damages that may be caused third persons by illegal sales is declared valid. . . . On principle it would seem that security for the protection of those who may be injured or damaged by the negligent or illegal operation of a business or calling subject to police regulation may be required wherever such requirement is not unreasonable. . . . Then, too, (in case of a jitney bus owner or lessee) the necessity of giving and maintaining such a bond may well be considered as more conducive to a careful operation of his business."<sup>72</sup>

*Taxation.*—Police power may be exercised through the imposition of a suitable license tax the payment of which is made prerequisite to carrying on the business or possessing the property regulated.<sup>73</sup> Thus the claim that because a city ordinance imposes

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<sup>69</sup> Ex parte Yun Quong (1911), 159 Cal. 508, 114 Pac. 835, Ann. Cas. 1912C 969.

<sup>70</sup> Ex parte Luera (1915), 21 Cal. App. Dec. 319, 152 Pac. 738.

<sup>71</sup> Ex parte Luera, *supra*, n. 70.

<sup>72</sup> Ex parte Cardinal (1915), 50 Cal. Dec. 37, 150 Pac. 348.

<sup>73</sup> Los Angeles County v. Hollywood Cemetery Ass'n (1899), 124

a dog license but does not prohibit the ownership of dogs within the city, its purpose is not regulation, cannot be sustained.<sup>74</sup> And the fact that a county ordinance, imposing a license tax, authorizes a suit to recover it, has no tendency to show that the tax is exacted for revenue rather than in the exercise of police power.<sup>75</sup>

Nevertheless, to be sustainable as an exercise of police power, the rate of a license tax must be such that the estimated yield of the tax will not exceed the reasonably to be anticipated expense of the collection of the tax, of issuance of license and permit, of such inspection, supervision and police surveillance as the particular business or property regulated is properly subjected to, of such additional protection from fire as it may render expedient, and of the detection and punishment of violations of the regulation.<sup>76</sup> It cannot be fixed at a figure which will yield a revenue for general repairs to roads.<sup>77</sup> Yet the fact that a license tax imposed is prohibitory in amount does not of itself establish its invalidity as a police regulation.<sup>78</sup>

It cannot be said from the amount of the license taxes imposed by the following regulations that their purpose is not regulation, but revenue:

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Cal. 344, 349, 57 Pac. 153, 71 Am. St. Rep. 75; *Plumas County v. Wheeler* (1906), 149 Cal. 758, 763, 87 Pac. 909; *Ex parte Ackerman* (1907), 6 Cal. App. 5, 16, 19, 91 Pac. 429; *Rapp & Son v. Kiel* (1911), 159 Cal. 702, 115 Pac. 651; *Ex parte Gilstrap* (1915), 50 Cal. Dec. 343, 152 Pac. 42.

<sup>74</sup> *Ex parte Ackerman* (1907), 6 Cal. App. 5, 15, 16, 91 Pac. 429.

<sup>75</sup> *Plumas County v. Wheeler* (1906), 149 Cal. 758, 767, 768, 87 Pac. 909.

<sup>76</sup> *Plumas County v. Wheeler*, *supra*, n. 75; *Ex parte McCoy* (1909), 10 Cal. App. 116, 137, 140, 101 Pac. 419; *Ex parte Miller* (1910), 13 Cal. App. 564, 567, 110 Pac. 139; *Ex parte Schuler* (1914), 167 Cal. 282, 287, 288, 139 Pac. 685.

<sup>77</sup> *Ex parte McCoy* (1909), 10 Cal. App. 116, 140, 101 Pac. 419: "The use of the public roads is not to be denied the men engaged in the sheep industry; they have the same right to their use as other citizens. If through their use by the sheepmen some detriment different from or greater to the roadways occurs, such use may be regulated, and the expense of any necessary and reasonable regulatory measures may be made part of the license fee charged. . . . But to fix a license charge to meet repairs on roads generally throughout the county which must be paid by all who engage in the business regardless of whether all of them contributed to the injury and regardless of damage done by other livestock, would be unreasonable;" *Ex parte Schuler* (1914), 167 Cal. 282, 286, 139 Pac. 685, where the court held that there can be no doubt that the exactions of the Motor Vehicle Act (1915 Cal. Stats. p. 639), go far beyond the reasonable limits of a mere police measure, and said: "The repair of public roads is not a police measure, yet it is evident that the bill was passed for the principal purpose of raising revenue for use in the upkeep of such highways."

<sup>78</sup> *Ex parte Richardson* (1914), 146 Pac. 520.

The ordinance of Eureka city, imposing a license tax of fifty dollars per quarter upon each person carrying on the business of selling intoxicating liquors within the city limits.<sup>79</sup>

The ordinance of Plumas county, hedging about the business of raising, herding and pasturing sheep and lambs with a number of police regulations, imposing an annual license tax of ten cents per head of sheep and lambs upon those in such business, and authorizing suit to collect the tax.<sup>80</sup>

The ordinance of San Francisco, imposing a license fee of one hundred and fifty dollars per annum on the business of dealing in malt or fermented liquors or wines in quantities of one quart and less than five gallons, not drunk on the premises.<sup>81</sup>

Ordinance 176 of San Mateo county, making it unlawful within the county to disinter or remove any human remains without a permit from the county health officer, requiring a fee of ten dollars to be paid upon making the application for the permit, directing the health officer to investigate each application and ascertain whether the disinterment or removal can be made without danger to the public health, and if so to issue the permit, and authorizing him, when necessary for the public health, to require the remains when disinterred to be forthwith hermetically sealed in a zinc-lined box.<sup>82</sup>

Statute of 1903, page 284, as amended by Statutes of 1907, page 765, and Statutes of 1909, page 419, making it unlawful except for agents of manufacturing pharmaceutical firms to carry on within this state, except at fixed places of business, the business of selling or disposing of drugs or nostrums, without first obtaining, semi-annually, from the state board of pharmacy, a license; requiring payment of a "license fee of one hundred dollars" to said board as prerequisite to the issuance of said license; and providing that "said tax" and all fines collected for violation of the act shall be paid into, and shall constitute, "a special fund for the enforcement of this act and of the provisions of the act or acts creating such board of pharmacy."<sup>83</sup>

From a consideration of the extrinsic evidence presented, it cannot be said that the purpose of the following ordinance is not regulation, but revenue:

The ordinance of Mono county, imposing an annual license tax on the business of raising, grazing, herding and pasturing cattle of seven cents for each cow, heifer, bull, or

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<sup>79</sup> Ex parte McNally (1887), 73 Cal. 632, 15 Pac. 368.

<sup>80</sup> Plumas County v. Wheeler (1906), 149 Cal. 758, 87 Pac. 909.

<sup>81</sup> Rapp & Son v. Kiel (1911), 159 Cal. 702, 706, 115 Pac. 651.

<sup>82</sup> Ex parte John (1911), 17 Cal. App. 58, 67, 118 Pac. 722.

<sup>83</sup> Ex parte Gilstrap (1915), 50 Cal. Dec. 343, 152 Pac. 42.

bullock in said business—section 435 of the Penal Code making failure to pay a license tax a misdemeanor.<sup>84</sup>

In case of the following regulations, however, it is clear that the purpose is not regulation, but revenue:

Statutes of 1885, page 13, requiring every agent of foreign fire insurance companies doing business in this state, to pay one per cent of the premiums collected by him for five insurance effected within any county, or city and county, into the fireman's relief fund thereof.<sup>85</sup>

The ordinance of Merced county, requiring all persons "who sell" intoxicating liquors to pay quarterly in advance a license tax of three thousand dollars for each quarter, providing that the tax shall be deemed a debt payable in advance and due to the county from any person who "commences, carries on, engages in, or conducts" in the county "any business, trade, occupation, or employment" upon which the tax is imposed, without having paid the license tax and procured a license, directing the district attorney to institute action in the proper court for the collection of the tax, and making it a crime to carry on a business for the carrying on of which a license is required without having procured the license.<sup>86</sup>

The provision of the ordinances of San Francisco, imposing an annual license tax of two dollars on each machine from which, on deposit of any piece of money or any token representing money within such machine, any candy, chocolate, postage stamps, or other article of merchandise, except raisins, is delivered; of one dollars on each such machine delivering raisins; provided that for machines attached to chairs or railings of places of amusement which deliver but one package without refilling the license tax shall be eight dollars per annum per one hundred machines; and requiring that every machine so licensed must have conspicuously attached a metallic tag, furnished by the tax collector, showing payment of license, and that every license shall be only for a particular location and not valid elsewhere except on written authorization of the tax collector; and making violation of any provision a misdemeanor.<sup>87</sup>

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<sup>84</sup> Ex parte Miller (1900), 13 Cal. App. 564, 567, 110 Pac. 139, where it appeared that the yield of the tax never exceeded seven hundred dollars per year, and in some years much less, and the evidence as to the probable cost of regulating said business was indefinite and inconclusive.

<sup>85</sup> San Francisco v. Liverpool etc. Insurance Co. (1887), 74 Cal. 113, 123, 15 Pac. 380, 5 Am. St. Rep. 425.

<sup>86</sup> Merced County v. Helm (1894), 102 Cal. 159, 163, 36 Pac. 399. See Ex parte Mason (1894), 102 Cal. 171, 36 Pac. 401.

<sup>87</sup> Ex parte Richardson (1915), 49 Cal. Dec. 593.

And from a consideration of the extrinsic evidence presented, it is clear that the purpose of the following ordinance was not regulation, but revenue:

The ordinance of Lassen county, imposing an annual license tax of five cents upon each sheep or lamb raised, grazed, herded, or pastured in such county, making numerous regulations concerning said business for the protection of health, the traveling public, and the county roads, providing for the enforcement of the ordinance, and declaring any violation of the ordinance a misdemeanor.<sup>88</sup>

*Confining to, or excluding from, locality or environment.*—Police power may also be exercised by confining to, or excluding from, a certain locality or environment, the business, act, or use of property involved in the regulation, whenever the ends for which police power exists will be subserved thereby.<sup>89</sup> Thus a municipality may properly establish fire limits within which wooden buildings are restricted;<sup>90</sup> may prohibit gambling on horse-races except within the inclosure of the race-track where the racing takes place;<sup>91</sup> may exclude steam shoddy and steam carpet-beating machines from within one hundred feet of churches, schools and dwellings;<sup>92</sup> may forbid public billiard halls and pool rooms except for the use of guests only, on permit from the city trustees, in hotels with at least twenty-five furnished bed rooms and a register for guests;<sup>93</sup> may create within its limits certain industrial districts, declare all the residue of the municipality a residence district, and make it unlawful to carry on certain businesses, among them lumber-yards, within the residence district;<sup>94</sup> may

<sup>88</sup> Ex parte McCoy (1909), 10 Cal. App. 116, 133, 101 Pac. 419.

<sup>89</sup> Ex parte Heilbron (1884), 65 Cal. 609, 610, 4 Pac. 648; Ex parte Yick Wo (1885), 68 Cal. 294, 297, 9 Pac. 139, 58 Am. Rep. 12, judgment reversed, Yick Wo v. Hopkins (1886), 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. Ed. 220; Ex parte Quong Wo (1911), 161 Cal. 220, 230, 118 Pac. 714; Ex parte Montgomery (1912), 163 Cal. 457, 458, 125 Pac. 1070; Ex parte Hadacheck (1913), 165 Cal. 416, 419, 132 Pac. 584.

<sup>90</sup> Ex parte Yick Wo (1885), 68 Cal. 294, 297, 9 Pac. 139, 58 Am. Rep. 12, judgment reversed, Yick Wo v. Hopkins (1886), 118 U. S. 356, 6 Sup. Ct. Rep. 1064, 30 L. Ed. 220, the court saying: "The power of regulation extends to the use as well as to the erection of wooden buildings;" Ex parte Fiske (1887), 72 Cal. 125, 13 Pac. 310; Ex parte Newell (1906), 2 Cal. App. 767, 768, 84 Pac. 226.

<sup>91</sup> Ex parte Tuttle (1891), 91 Cal. 589, 27 Pac. 933.

<sup>92</sup> Ex parte Lacey (1895), 108 Cal. 326, 335, 41 Pac. 411, 49 Am. St. Rep. 93, 38 L. R. A. 640, where the ordinance was held not unreasonable in the limits of distance fixed.

<sup>93</sup> Ex parte Murphy (1908), 8 Cal. App. 440, 444, 97 Pac. 199; Ex parte Murphy (1909), 155 Cal. 322, 100 Pac. 1134.

<sup>94</sup> Ex parte Montgomery (1912), 163 Cal. 457, 458, 125 Pac. 1070:

forbid brickyards and brickkilns within a district primarily residential in character;<sup>95</sup> may forbid public laundries in buildings used in part as public stores,<sup>96</sup> or confine them within certain limits;<sup>97</sup> and may prohibit cemeteries and the burial of the dead,<sup>98</sup> and blasting,<sup>99</sup> within thickly settled localities. State and local enactments restricting the traffic in alcoholic liquors to or from certain localities and environments are also familiar and valid regulations.<sup>1</sup> But an ordinance of San Francisco, prohibiting quarrying within a certain part of the municipality, deprives the owner of the enjoyment of his land pro tanto, and cannot be sustained under police power.<sup>2</sup> And while a county may in a proper case prohibit the manufacture of gas within prescribed limits,<sup>3</sup> an ordinance of Los Angeles county, a county of four thousand square miles, making it unlawful to erect or maintain gasholders or gasworks within a portion of said county not exceeding three hundred acres in extent, lying between the cities of Pasadena and South Pasadena on one side, and Los Angeles city on the other, and containing but fifteen dwellings, within which district at the time of the passage of the ordinance gasworks supplying gas to the neighboring communities were in operation, no dwelling being within three hundred yards of the gasworks, and there being no prohibition against gasworks or gasholders elsewhere in the county,

"While a lumber-yard is not per se a nuisance, it takes no extended argument to convince one that in a residence district, such a place may be a menace to the safety of the property in its neighborhood for various reasons, among which may be mentioned the inflammable nature of the materials kept there."

<sup>95</sup> Ex parte Hadacheck (1913), 165 Cal. 416, 419, 132 Pac. 584, where the prohibition extended to a district in Los Angeles City containing about three square miles.

<sup>96</sup> Ex parte San Chung (1909), 11 Cal. App. 511, 516, 105 Pac. 609.

<sup>97</sup> Ex parte Quong Wo (1911), 161 Cal. 220, 228, 118 Pac. 714.

<sup>98</sup> Laurel Hill Cemetery v. San Francisco (1907), 152 Cal. 646, 472, 93 Pac. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080, judgment affirmed (1910), 216, U. S. S. 358, 30 Sup. Ct. Rep. 201, 54 L. Ed. 515; Abbey Land & Improvement Co. v. San Mateo County (1914), 167 Cal. 434, 438, 139 Pac. 1068.

<sup>99</sup> Ex parte Kelso (1905), 147 Cal. 609, 613, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. (N. S.) 796.

<sup>1</sup> Ex parte McClain (1882), 61 Cal. 436, 10 Pacific Coast Law Journal, 223, 44 Am. Rep. 554; Grumbach v. Leland (1908), 154 Cal. 679, 683, 98 Pac. 1059; Ex parte Burke (1911), 160 Cal. 300, 303, 116 Pac. 755; Richter v. Lightston (1911), 161 Cal. 260, 264, 118 Pac. 790, Ann. Cas. 1913B 1082; McRae v. Pine (1914), 25 Cal. App. 594, 598, 144 Pac. 983.

<sup>2</sup> Ex parte Kelso (1905), 147 Cal. 609, 612, 82 Pac. 241, 109 Am. St. Rep. 178, 2 L. R. A. (N. S.) 796.

<sup>3</sup> Ex parte Smith (1904), 143 Cal. 368, 370, 77 Pac. 180.



cannot be sustained.<sup>4</sup> Moreover, "the reasons which make it necessary and proper to exclude from the thickly settled portions of cities and towns slaughter-houses, soap factories and tanneries, with their offensive smells; magazines for the storage of powder, and powder mills, with their attendant dangers; or any business or occupation which seriously interferes with the health or comfort of others if permitted in such localities, do not apply to a hospital whose inmates are harmless although insane."<sup>5</sup>

*Socializing a business.*— It is clear that a city has power to reserve to itself the exclusive right to collect and remove garbage, waste, ash and other refuse which is, or by delay may become, a public nuisance.<sup>6</sup>

*Charles Bufford.*

San Francisco, California.

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<sup>4</sup> Ex parte Smith (1904), 143 Cal. 368, 77 Pac. 180.

<sup>5</sup> Ex parte Whitwell (1893), 98 Cal. 73, 83, 32 Pac. 870, 35 Am. St. Rep. 152, 19 L. R. A. 727.

<sup>6</sup> Ex parte Zhizhuzza (1905), 147 Cal. 328, 335, 81 Pac. 955.